

92A. GAS FRANCHISE

92A.10 - Definitions

92A.10. Definitions. The following words used in this chapter will have the meanings ascribed to them in this section except when the content clearly indicates a different meaning.

Subd. 1. "City" means the City of Rochester, County of Olmsted, State of Minnesota.

Subd. 2. "Company" means Aquila, Inc., a Delaware Corporation.

Subd. 3. "Effective Date" means the effective date of this Ordinance, that is, upon adoption and publication, as provided by law.

Subd. 4. "Franchise" means the grant of rights made by City to Company in this Ordinance, subject to its terms and conditions.

Subd. 5. "Gas" means natural gas, manufactured gas, a mixture thereof or other form of gaseous energy.

Subd. 6. "MPUC" refers to the Minnesota Public Utilities Commission or any successor regulatory agency.

Subd. 7. "Notice" means a writing served personally or by certified mail by any party or parties on any other party or parties. Notice to Company shall be served upon Aquila, Inc., District Director, P.O. Box 6538, Rochester, Minnesota 55903. Notice to the City shall be served upon the City Administrator, City Hall , 201 4th Street SE, Rochester, Minnesota 55904.

Subd. 8. "Public Grounds" means all real property owned by or dedicated to the City, other than public ways, with respect to which City holds the legal right or title to grant or withhold easement, leasehold or occupancy rights or servitudes to Company.

Subd. 9. "Public Rights-of-Way" means, streets, avenues, alleys, parkways, and other public rights-of-way within the City.

92A.20 - The Franchise

92A.21. Franchise. Subdivision 1. City hereby grants and conveys to Company the following non-exclusive rights and privileges within the City as its boundaries presently exist and as they may be extended in the future:

(a) The right and privilege to operate, construct and maintain a public gas utility;

(b) The right to occupy and utilize the City's public rights-of-ways of City for the purpose of enlarging, extending, operating, repairing and maintaining, in, over, under and across the same, all gas pipes, mains, and appurtenances which are necessary or customary in accordance with sound utility practices for the purpose of the transmission of gas, or the distribution of gas, for public and private use; and

(c) The right to occupy and utilize the public grounds of City for the purpose of enlarging, extending, operating, repairing and maintaining, in, over, under and across the same, all gas pipes, mains, and appurtenances which are necessary or customary in accordance with sound utility practices for the purpose of the transmission of gas, or the distribution of gas, for public and private use. The right to occupy and utilize public grounds is subject to the City's approval of a revocable permit, which will contain conditions including the

Company's responsibility for payment of removal or relocation costs in a circumstance where a public project is proposed for the public grounds.

Subd. 2. The franchise granted in subdivision 1 is subject to (A) this chapter; (B) any applicable City of Rochester ordinance or permit procedure; (C) any applicable City of Rochester customary and necessary practice; and (D) the City's exercise of its police power to adopt and enforce resolutions and ordinances necessary to the public's health, safety and welfare.

92A.22. Franchise Term. The rights and privileges granted by the Franchise shall remain in effect for a period of ten years from the effective date. However, on the tenth anniversary of the effective date, the City may, at its option, extend the Franchise for an additional ten-year period subject to the provisions of this Chapter.

92A.30 - Extension of Service

92A. 31. Extension of Service. Upon receipt and acceptance of a valid application for service, Company shall, subject to its reasonable economic feasibility criteria, provide such reasonable extensions of its mains and pipes from time to time as are required to serve City and customers within the current and future limits of the City. If such extensions are governed by any Company tariff on file with the MPUC, Company shall provide City with a copy of the tariff and notice of any Company proposal to change any tariff provision related to the extensions. Company shall apply any tariff in a reasonable and liberal fashion so as to promote and maximize commerce and development within the City and to the full extent permitted by law. In the event Company proposes any charge for such extensions (sometimes referred to as aids to construction) or in the event Company proposes to refuse to provide such extension, Company must give notice of such action to the City.

92A.40 - Construction Restrictions

92A.41. Construction Restriction. Subdivision 1. Whenever the Company desires to open or disturb any public right-of-way or public ground for the purpose of maintenance, repair or laying of gas mains or pipes, it must give the City reasonable advance notice, but not less than two business days, by filing a written notice with the Public Works Director. In any case, Company cannot commence such work before obtaining from the City an appropriate permit or other written consent. During the progress of the work, the Company cannot endanger or unnecessarily obstruct the passage of traffic or the normal and customary use of the public right-of-way or public ground.

Subd. 2. Company need not obtain any required permit or other written consent in order to perform (A) routine maintenance or repairs where excavation is not required; or (B) in an emergency situation when it is necessary for Company to act immediately to remedy a situation that jeopardizes the public health or safety. However, in an emergency situation, Company must as soon as practicable notify the City of the emergency situation and its efforts to remedy the situation. In addition, in an emergency situation, the Company must file its request for a permit no later than the second business day following the occurrence.

Subd. 3. Company must promptly and diligently restore public right-of-way and public ground to as good condition as it was before the excavations were made. However, the Company cannot interfere with any improvements being made by the City without the City's consent.

Subd. 4. If Company fails to promptly restore the disturbed public right-of-way or public ground within 30 days of notice by the City, City may do so at the Company's expense. Upon City's demand, Company must pay to the City its reasonable cost of repair together with its administrative expense and overhead associated with the repair.

Subd. 5. During the progress of its work, Company must keep the public right-of-way or public ground guarded in order to prevent accidents to persons or property.

92A.42. Upon the City's request and within a reasonable time, Company must provide field locations for all its underground facilities. The period of time will be considered reasonable if it compares favorably with the average time required by the City to locate municipal underground facilities for the Company.

92A.44. Before Company constructs any new structure or converts any existing structure for the manufacture or storage of gas within the City, Company must first obtain City approval of the structure and its location. City's approval must not be unreasonably withheld provided applicable zoning and other requirements are satisfied.

92A.50 - Relocation of Facilities

92A.51. Subdivision 1. If the City determines to change, move or improve its public ways or public grounds for any public purpose, the City may require the Company to move any part of its system of mains, pipes, conduits, or other necessary attachments and appurtenances used for the storage conveyance, distribution, and sale of gas. The City's relocation requirement must be in writing and must be based upon the need to avoid interference with other permitted uses. In response to the City's written notice, the Company must relocate its facilities at its sole cost.

Subd. 2. If the City requests the Company to relocate its facilities or equipment primarily for a non-public purpose or for the primary benefit of a commercial or private project and such removal is necessary to prevent interference rather than merely for the convenience of the City or other right-of-way user, the Company shall receive payment from the commercial or private developer or other non-public entity for the cost of such relocation as a precondition to relocating its facilities or equipment.

Subd. 3. City shall consider reasonable alternatives in designing its public works projects so as not to arbitrarily cause the Company unreasonable additional expense in exercising its authority under this Section.

Subd. 4. This Section does not compel a waiver by the Company, nor constitute a taking by the City, of any written grant of easement to Company or any prescriptive rights the Company has acquired by way of adverse possession independent of and without reliance by the Company on this Franchise or any prior franchise adopted by City.

92A.52. Any relocation, removal or rearrangement of any Company facilities made necessary because of the extension into or through City of a federally aided highway project shall be governed by the provisions of Minnesota Statutes Section 161.46.

92A.53. If a public right-of-way is vacated, improved or realigned because of a renewal or redevelopment plan which is financially subsidized in whole or in part by the Federal government, the reasonable nonbetterment costs of Company's relocation or removal of its facilities shall not be the obligation of Company if such costs under then prevailing law are the obligation of the Federal government or any agency thereof.

92A.54. This Chapter does not relieve any third party from liability arising out of their failure to exercise reasonable care to avoid injuring Company's facilities while performing any work connected with grading or changing of any public way or with any construction on or adjacent to any public way. However, this section does not limit the City's right to indemnification under Section 92A.61.

Article 92A.60 - Indemnification and Insurance

92A.61. Subdivision 1. Company must indemnify and hold the City harmless from any and all claims, including reasonable attorneys' fees, arising out of the Company's negligence, wrongful acts or omissions in connection with the Company's operation under this Franchise. The term "Company" includes the Company, its agents, servants, independent contractors or employees. When a claim is made against the City, the City shall promptly notify the Company of such suit so as to give the Company sufficient time to appear on behalf of and defend the City.

Subd. 2. If Company elects to defend City, it will thereafter have complete control of such litigation. However, the Company may not settle such litigation without the City's consent, which will not be unreasonably withheld.

Subd. 3. Company's obligation to indemnify the City shall not extend to any injury to persons or property caused by the City's negligence, wrongful acts or omissions.

Subd. 4. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to City. Company, in defending any action on behalf of City, is entitled to assert in any action every defense or immunity that City could assert in its own behalf.

Subd. 5. Company's indemnification obligations shall survive the expiration, amendment or termination of this Franchise.

92A.62. Upon request, Company must furnish City with a summary of insurance coverage designed to fulfill the Company's indemnification and hold harmless obligations provided in Section 92A.61.

92A.63. Subdivision 1. In operating a public gas utility, the Company shall observe all federal, state and local laws, rules, regulations and orders with respect to the discharge, generation, removal, transportation, storage and handling of all materials, substances and wastes deemed toxic or hazardous to health, natural resources or the environment pursuant thereto ("Hazardous Substances").

Subd. 2. Company shall remove or remediate any Hazardous Substances (A) located on, in or surrounding its gas distribution facilities; or (B) located on, in or surrounding the public ways, public grounds or elsewhere within the City. Such removal or remediation must comply with all applicable laws, regulations and lawful governmental orders. Company must pay all costs associated the removal or remediation of Hazardous Substances.

Subd. 3. Section 92A.61 applies to all claims made against City by any person including any governmental agency which asserts any right to costs, damages or other relief based upon the terms and conditions imposed upon Company under this Section or which arise from or are related to Company's negligence, wrongful acts or omissions in complying with any law, rule, regulation or lawful order governing Hazardous Substances.

92A.70 - Vacation of Public Ways

92A.71. The City shall give the Company at least two weeks prior written notice of a proposed vacation of a public right-of-way. Except where ordered pursuant to Section 92A.51, the vacation of any public right-of-way, after the installation of gas facilities, shall not operate to deprive Company of its rights to operate and maintain such gas facilities, until the reasonable cost of relocating the same and the loss and expense resulting from such relocation are first paid to Company. In no case, however, shall City be liable to the Company for failure to specifically preserve a right-of-way, in the exercise of its authority under Minnesota Statutes, Section 160.29.

92A.80 - Reports and. Records

92A.81. Upon prior written request of the City, the Company shall file annually with the City Administrator the Company's certified annual financial statement showing the Company's capitalization, its profit and loss statements for the prior calendar year and its balance sheet.

92A.90 - Rates and Service

92A.91. The MPUC regulates the Company's provision of gas service and its rates charged for gas service pursuant to Minnesota Statutes, Chapter 216B. City reserves the right to regulate the rates and terms and conditions of Company's gas service within the City to the full extent permitted by law if and to the extent that such regulation is not preempted by the regulatory authority of the State of Minnesota or the Federal government. The Company reserves the right to challenge any regulatory action including the issue of the City's authority to regulate rates and service. City and Company reserve their respective rights generally and specifically granted pursuant to the laws of Minnesota as adopted by the Legislature, the Constitution of the State of Minnesota, and other law as interpreted by the Courts.

92A.92. In the event Company shall at any time after the Effective Date apply to the MPUC to change its rates or terms and conditions of gas service, Company shall provide reasonable advance notice of its application to the City. The notice must include the Company's description of the proposal's effect upon the City and the Company's customers located within the City. City may elect to intervene in Company's proceeding before the MPUC or any other court or agency involving Aquila operations, for and on behalf of City or customers located within City. City may petition the MPUC (or other state agency) to order Aquila to reimburse City for its costs and fees incurred in said proceedings. Company reserves the right to challenge such intervention or petition.

92A.100 - Franchise Fee

92A.101. Subdivision 1. The laws of the State of Minnesota authorize a payment of compensation to a city by the provider of natural gas services in the form of the imposition of a city franchise fee to raise revenue or to defray costs accruing as a result of such operations, or both. This payment is commonly referred to as a franchise fee.

Subd. 2. A franchise fee is not being imposed at this time as part of the adoption of this ordinance. The Council, at its discretion, may at any time during the term of the ordinance impose a franchise fee based upon rates as indicated in the table below. The volumetric fee rate is per 100 cubic feet of gas by volume, transported, sold, furnished or delivered by Company within the current and future limits of City, utilizing any of the Company's services or facilities.

| | |
|----------------|--------|
| Commercial | |
| Industrial | |
| Interruptible | |
| Residential | |
| Flat Fee | |
| (annual) per | |
| meter | |
| \$ | 6.00 |
| \$ | |
| 6.00 | |
| \$ | 6.00 |
| \$ | 6.00 |
| Volumetric Fee | |
| (per 100 cu.ft | |
| volume) | |
| \$ | 0.0015 |
| \$ | |

0.0015
\$ 0.0008
\$ 0.0050

Subd. 3. The Franchise Fee shall be adjusted for net write-off of uncollectible accounts and corrections of bills theretofore rendered. The Company may list the local franchise fee collected from customers as a separate item on bills for utility service issued to customers.

Subd. 4. The franchise fee shall be effective ninety days following adoption of this Ordinance and shall continue until amended or repealed during the term of this Ordinance. Initial and final payments shall be prorated for the portions of the periods at the beginning and end of the term of this Ordinance.

92A.102. The Company must report and pay the franchise fee to the City on a quarterly basis. Such payment shall be made not more than thirty days following the close of the period for which payment is due. Company shall provide information by customer class to City to show how fee was determined.

92A.103. The franchise fee rates provided in Section 92A.101 shall be adjusted annually for inflation, based upon the most recent Urban Consumer Price Index inflation adjustment rates. Such adjustment shall not require formal amendment to this Ordinance.

92A.104. If any person challenges the collection, any aspect of the franchise fee or any other payment to be made to City pursuant to this Franchise, the Company must promptly give notice to City and must, in any case, diligently and continuously exercise its efforts to sustain said fee and payments and the time and manner of its collection. If at any time the MPUC, or other authority having proper jurisdiction, prohibits such recovery, then the Company will no longer be obligated to collect and pay the franchise fee. The Company agrees to make its records related to the calculation and payment of the franchise fee available for inspection by the City at reasonable times.

92A.105. If for any reason the amount or rate of the franchise fee is determined to be in excess of the amount or rate allowed by law, then the amount or rate shall automatically, and without further action by City or Company, be reduced to the maximum amount or rate permitted by law.

92A.106. At this time, the Company is subject to all applicable permit or licensing fees. At such time that a franchise fee may be imposed by the Council, the franchise fee will be in lieu of any other permit or licensing fee, charge or cost imposed on the Company for providing gas service or performing work necessary to provide gas service. The City cannot charge the Company any right-of-way fee imposed by a right-of-way ordinance during this franchise term.

92A.110 - Successors and Assigns

92A.111. Company reserves the right to transfer or assign any interest in this franchise, in accordance with the rules and regulations of the MPUC. All rights, privileges and authority hereby granted to Company shall inure to the benefit of its successors and assigns, subject to all the terms, provisions and conditions herein contained, and all obligations hereby imposed upon Company shall be binding upon its successors and assigns.

92A.120 - Confidential Information

92A.121 The Minnesota Government Data Practices Act (the Act) set forth in Minnesota Statutes 13.01 et seq., requires that the City provide public access to public data as defined by the Act. The Company understands that public data may include information relating to the Company and its operations that the

Company would otherwise prefer to keep confidential.

92A.122. The City will provide public access to public data relating to the Company or its operations in compliance with and as provided by the Act, regulatory agency rule or other law.

92A.123. At the time that it provides any data to the City, the Company will specifically identify data that it claims to be private, protected, non-public, or confidential, or that is otherwise precluded from public disclosure by the Act, regulatory agency rule, or other law. At such time, the Company will also identify the provisions of the Act, regulatory agency rule or other law that preclude public disclosure of such data.

92A.124. As provided by Minnesota Statutes, Section 13.072, the Company may request an advisory opinion from the Commissioner of the Minnesota Department of Administration regarding the classification of Government Data relating to the Company. The City will abide by such an advisory opinion of the Commissioner, except as otherwise required or provided by law, regulatory agency rule, or court decision or other advisory opinion of the Commissioner.

92A.130 - Effective Date and Acceptance

92A.131. The Franchise shall be effective as of January 1, 2003.

92A.140 - Disclosure

92A.141. Upon the City's written request, Company shall file a report with the City if Company makes contributions or expenditures, other than usual civic, charitable contribution, and normal authorized business expenses in an aggregate amount in excess of \$10,000 in any calendar year as for the purpose of directly influencing any resident or elected or appointed official of the city with respect to the Franchise or the subject matter thereof. However, the Company shall not be required to disclose contributions or expenditures related to actual or anticipated action of the City, its residents, elected or appointed officials, or any other party promoting, encouraging, or advancing municipal takeover (i.e. condemnation) of Company's property located in and around the City. The City may not limit or restrict Company's contributions or expenditures in any manner not permitted by state or federal law.

92A.150 - Defaults

92A.151. If Company shall be in default in the performance of any of the material terms and conditions of this Ordinance, and shall continue in default for more than 30 days (or fails to initiate the cure of the default within said period and diligently pursue said cure, if the cure of the default cannot reasonably be accomplished within said 30 days after receiving notice from the City of such default), the City may, following a public hearing thereon, elect to either cure such default and charge Company for the costs thereof, or seek equitable relief for the enforcement of this Ordinance. The notice of default must be in writing, must specify the provisions of this Ordinance and the performance of which it is claimed that Company is in default and the date of the public hearing required to be held. The public hearing must not less than 30 days nor more than 60 days from the date of such notice. Such notice shall be served in the manner provided by the laws of Minnesota for the service of original notices in civil actions. Company at such hearing shall be afforded an opportunity to present whatever information it deems appropriate. Nothing herein shall in any way be construed, to prevent a review of such City action by the appropriate Minnesota Court and/or regulatory agency, nor limit the right of City to enforce this Ordinance by such equitable or legal remedies as may be provided by law. In the event of repeated or protracted violations of this Ordinance involving payments due to City, City may require Company to file a bond or letter of credit with the City Administrator, against which City may draw to assure prompt payment of amounts due by Company to City under this Ordinance.

92A.160 - Force Majeure

92A.161. It shall not be a breach or default under this franchise if either party fails to perform its obligations hereunder due to Force Majeure. Force Majeure shall include, but not be limited to, the following: A) physical events such as acts of God, landslides, lightning, earthquakes, fires, freezing, storms, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery, equipment or distribution or transmission lines; B) acts of others such as strikes, work-force stoppages, riots, sabotage, insurrections or wars; or C) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, executive order, or regulation promulgated by a governmental authority having jurisdiction; and any other causes, whether of the kind herein enumerated or otherwise not reasonably within the control of the affected party to prevent or overcome. Each party shall make reasonable efforts to avoid Force Majeure and to resolve such event as promptly as reasonably possible once it occurs in order to resume performance. However, this provision shall not obligate a party to settle a labor strike.

92A.170 - Construction, Jurisdiction and Venue

92A.171. This Franchise is intended to be performed in the State of Minnesota and shall be construed and enforced in accordance with the laws of Minnesota. Company shall be subject to personal jurisdiction in the State of Minnesota. Any action related to this Ordinance or its enforcement must be venued in Olmsted County or such other judicial district as may include the City if the judicial districts of the State of Minnesota be revised after the Effective Date. This Ordinance and its acceptance by Company shall be construed as a contract between Company and City. The provisions of this Ordinance shall be enforceable only by Company and City and not by any third party. A third party does not have a claim to any cause of action against Company by reason of the adoption of this Ordinance.

92A.180 - Miscellaneous Provisions

92A.181. If any clause, sentence or section of this Ordinance is deemed invalid, the remaining provisions shall remain in effect.

92A.182. Any waiver of any obligation or default under this Ordinance shall not be construed as a waiver of any future defaults, whether of like or different character.

92A.183. All ordinances or franchises or parts of ordinances or franchises in conflict herewith are hereby repealed.

(3623, 2/18/04)